(3)

No. 91-810

In The

Supreme Court of the United States

October Term, 1991

CITY OF BURLINGTON,

Petitioner,

v.

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, AND ROSE A. BESSETTE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM W. PEARSON
MOLLOY, JONES & DONAHUE, P.C.
33 North Stone Avenue, Suite 2100
Tucson, Arizona 85701
(602) 620-5520

Counsel of Record for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

A. WHETHER THE RESPONDENTS' HAZARDOUS WASTE CLAIMS, AS DETERMINED BY THE DISTRICT COURT AND SECOND CIRCUIT, PROPERLY QUALIFIED FOR THE STATUTORY NOTICE AND DELAY EXCEPTION UNDER RCRA (AS EXPLICITLY CONFIRMED BY *HALLSTROM*) WHEN RESPONDENTS ASSERTED THEIR CITIZEN SUIT CLAIMS AGAINST PETITIONER FOR DISPOSING OF HAZARDOUS WASTES IN AND DISCHARGING TOXIC POLLUTANTS FROM PETITIONER'S LANDFILL?

B. WHETHER THE DISTRICT COURT AND SECOND CIRCUIT COURT OF APPEALS CORRECTLY DETERMINED THAT THE RESPONDENTS SUBSTANTIALLY PREVAILED AND PROPERLY AWARDED THEM COMPENSATORY AND ENHANCED ATTORNEY'S FEES WHEN RESPONDENTS ACHIEVED THE FOLLOWING RESULTS:

1. PETITIONER WAS FOUND TO HAVE COMMITTED FOUR STATUTORY VIOLATIONS OF RCRA AND CWA;
2. PETITIONER WAS ORDERED TO CLOSE ITS LANDFILL;
3. PETITIONER WAS ORDERED TO INSTALL LEACHATE COLLECTION AND METHANE GAS CONTROL SYSTEMS BY A DATE CERTAIN?

QUESTIONS PRESENTED – Continued

C. WHETHER THE PETITIONER, AS DETERMINED BY THE DISTRICT COURT AND SECOND CIRCUIT, DISCHARGED POLLUTANTS FROM A POINT SOURCE INTO WATERS OF THE UNITED STATES WHEN THE PETITIONER DISCHARGED TOXIC POLLUTANTS FROM ITS LANDFILL THROUGH A CULVERT INTO A WETLAND?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

STATEMENT OF CASE

The City's Petition (hereinafter cited as "Pet. at P."), both in its Statement of Case and throughout its Reasons for Granting Certiorari, is erected on substantial misstatements of fact. These misstatements are:

1. Patently false on the face of the record;
2. Misleading by omission of essential related facts;
3. Directly contradicted by the extensive stipulation of facts submitted by the parties in the District Court;
4. Newly asserted for the first time in the Petition and not part of any proceeding below; or
5. A combination of the above.

Throughout its Statement of Case, the Petitioner creates further confusion by intermixing its factual assertions with legal arguments. The end effect of the City's series of misstatements and intermixing of fact with argument is to present a factual record which is inaccurate, misleading and unreliable. This is reason enough for why the City's Petition should be denied.

The following factual summary and analysis is based on the record below incorporating the District Court's Findings which were adopted by the Second Circuit *in toto*. Record cites are to the District Court's numbered Findings of Fact (FOF) found in Petitioner's Appendix (App. 89-114), the Joint Appendix (JA) filed in the Second Circuit or court documents in Petitioner's Appendix (App. 1-279).

The Respondents are owners of residential property located on Manhatten Drive overlooking and contiguous to the Landfill. (App. 89, FOF 1) The City has owned and operated the Landfill since at least 1961. (App. 89, FOF 2). The Landfill is rectangular in shape and is approximately eleven acres in size. (App. 89, FOF 3-4) The area adjacent to and north of the Landfill is commonly known as the Intervale which is in the flood plain of the Winooski River (App. 89-90, FOF 7 & 9) The Intervale is a wetland: it is inundated or saturated by surface water sufficient to support, and under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, *i.e.*, a cattail marsh. (App. 90, FOF 12). While such a marsh tends to be resistant to toxic chemicals, the marsh is a "climax system, *i.e.*, cattails can stand in the face of chemical insult, but when deterioration of them finally can be seen, they will degrade quickly, and that will be 'long past the point * * * of saving the system.' " (App. 27-28)

Groundwater flows generally south to north and northwest beneath the Landfill. (App. 90, FOF 17) Trash is buried in the Landfill at a depth of approximately nine feet above the groundwater table on the southern edge of the Landfill, and at a depth of approximately nine feet below the groundwater table on the northern edge of the Landfill. (App. 90-91, FOF 18) As a result groundwater mixes and flows through contaminants in the Landfill. (App. 91, FOF 19) From 1950 to May 12, 1982, thousands of gallons of hazardous wastes, in both liquid and solid form, generated by local industries were disposed of in the Landfill.[1] (App. 94-95, FOF 44-50)

---

[1] A partial list of these wastes includes: trichloroethylene; paint solvents and lubricating oils; plating or paint sludge

(Continued on following page)

Since at least April, 1972, the City knew that the Landfill was generating leachate. (App. 91, FOF 22). Leachate is liquid that has passed through or emerged from solid waste and contains soluble, suspended or miscible materials removed from such wastes. (App. 91, FOF 21) Leachate volume at the Landfill is generated by either percolation of precipitation into the Landfill mass (about 11,000 gal./day in 1984) or by groundwater moving through the Landfill mass (at 1,000-4,000 gal./day in 1984). (App. 91, FOF 23 & 25) Leachate tests taken by the City in 1980 revealed that the leachate being discharged through the culvert into the marsh and under the railroad grade was the most concentrated leachate found anywhere in the state. (App. 97-98, FOF 66) As of June, 1980, the City knew that very contaminated water was being discharged into the wetland directly downgradient from the Landfill. (App. 98, FOF 67) Landfill leachate contains chemicals and compounds found on toxic and hazardous waste lists under RCRA and the CWA, including the "toxic pollutants" list designated by the EPA Administrator pursuant to 33 U.S.C. § 1317(a).[2] (App. 92, FOF 30-33)

(Continued from previous page)

solids containing cadmium, chromium, lead, sulfuric acid and/or chromium; degreasing solvent-soaked rags, heat-treating salt containing lead, barium, cadmium, chromium, arsenic and mercury; kerosene; lacquer thinner; washing solvent containing trichloroethylene; toluene; sodium cyanide; degreaser containing trichloroethylene, toluene, and sodium cyanide. (JA 204, 238-239)

[2] CWA toxic pollutants found in and around the Landfill include: carbon tetrachloride, benzene, lead, toluene, cyanide,

(Continued on following page)

Leachate from the Landfill was evaluated for toxicity to freshwater aquatic life, using standard bioassay techniques. (App. 93, FOF 36) These tests indicated that the leachate was toxic to freshwater aquate life, *i.e.*, the fathead minnow (a vertebrate in the food chain), water flea and algae. (App. 27, 93, FOF 37) The amount and presence of toxic chemicals, including lead, found in groundwater wells increased over time and were bioaccumulating in the Intervale. (App. 27)

In 1978, the City was notified of an explosive methane gas problem at the landfill. (App. 109, FOF 129) Concentrations of explosive gas generated by the Landfill exceeded the "lower explosive limit" for the gas at the Landfill boundary. (App. 99, FOF 82) In 1984 the City installed 40 methane gas monitoring wells at and beyond the Landfill boundary which established that the flow of methane gas moved away from the Landfill boundary. (App. 99, FOF 80-81) Twenty gas monitoring wells were

---

(Continued from previous page)

phenol, pentachlorophenol, endosulfan sulfate, 1,1 dichloroethane, 1,2 dichloroethane, and 1,1,1 trichloroethane. (FOF 33, App. 92-93)

In addition, surface water samples commonly contained: 1,1 dichlorethane, 1,2 dichlorethane, carbon tetrachloride, benzene, xylene, halogenated organic compounds, tetrahydrofuran, nickel, cyanide, phenols and 1,1,1 trichloroethane. (FOF 31, App. 92)

Groundwater samples commonly contained: halogenated compounds, lead, tetrahydrofuran, nickel, cyanide, bis (2-ethylhexyl) phathalate, phenols, 1,2 dichloroethane, pentachlorophenal, endosulfan sulfate and nitrates. (FOF 32, App. 92)

installed through the Respondent Dagues' yard. (App. 102, FOF 88) From November, 1984 until August, 1985 the City recorded at least 829 separate readings on the Respondent Dagues' property above the lower explosive level of methane gas. (App. 102, FOF 86) Of the other gas test wells installed on non-Dague properties, the City recorded in the same period at least 114 separate readings above the lower explosive level of methane gas. (App. 99, FOF 83) Methane gas generally rises but may move horizontally when the surface of the ground is frozen. (App. 99, FOF 79) Methane gas had seeped into the Respondent Dague's basement. (App. 102, FOF 85) The Petitioner installed a gas warning device in the Respondent Dague's basement set to buzz before the explosive level was exceeded. (App. 102, FOF 87)

The Petitioner never divulges anywhere in its Petition this pervasive, dangerous condition caused by its Landfill methane gas generation nor the fact that the City contested through trial whether its Landfill was the source of methane gas in the Respondent Dague's basement.

The Petitioner's only mention of the methane gas problem relates to the Petitioner's December 27, 1985 "operative date" for its methane gas control system installation upon which the Petitioner partially bases its argument that the Respondents are not prevailing parties for attorney's fee purposes. (Pet. at P. 4, Pet. at P. 7 & P. 23) The "temporary blowers" were installed after Respondents' suit was filed, during the preliminary injunction hearing and at least two months before the permanent system became fully operational. (App. 60-61) In addition, the Petitioner was on notice on February 26, 1986 by

the Magistrate's Report and Recommendation that Petitioner would be ordered to fully install the systems within sixty days of the Order. (App. 60) Just as it did before the District Court and the Second Circuit, the Petitioner argues in its Petition that it fully installed its systems prior to March 25, 1986, that is, just before being ordered to do so by the District Court Order dated March 26, 1986. Therefore, goes the Petitioner's argument, the Respondents gained no relief, did not prevail and are not entitled to attorney's fees. Neither the District Court nor the Second Circuit was fooled by this one-sided recitation of the facts. (App. 30-31 & 130-134)

Beginning in 1981, the Petitioner entered into a series of Assurances of Discontinuance with the state to improve its operations at the landfill, to fix problems at the landfill and to set deadlines for closure. On P. 3-4 the Petitioner omits a significant factual history of its improper operation of its Landfill, its continuing violations of several Assurances and its repeated requests for closure extensions.

In 1980, the state denied the City's application for sanitary landfill certification based on the Landfill's discharge of leachate of significant concentration and indeterminant quantity. (App. 97, FOF 63-65) The City's first Landfill Assurance of Discontinuance with the state was dated December 15, 1981 (App. 103, FOF 99)[3] and required the City to close the landfill by July 1, 1984 unless the City built a Resource Recovery Facility (RRF).

---

[3] Contrary to the Petitioner's statement there was no January, 1981 Assurance. (Pet. at P. 5)

(App. 103, FOF 99) Having decided not to build a RRF, the City obtained, through a second Assurance dated September 12, 1984, a "limited extended operation period" until January 2, 1985. (App. 104, FOF 104) On January 31, 1985 the City obtained a third Assurance extending the Landfill closure date to January 1, 1988 unless the City chose again to build an RRF which would permit the City to keep the Landfill open until January 1, 1990. (App. 105-106, FOF 109, 116) If the City chose the RRF option, then the City had to notify the state by July 1, 1987 of this choice or close by January 1, 1988. (App. 106, FOF 116) The City failed to notify the state and did not choose the RRF option. (App. 107, FOF 117) The City did not close the Landfill by January 1, 1988. (App. 108, FOF 123) The January 31, 1985 Assurance required the City to install a leachate collection system by September 1, 1985 and a methane control system by December 2, 1985. (App. 105, FOF 114) The City installed neither system by these deadlines. (App. 105, FOF 114)

The above history reveals that the Petitioner obtained extension after extension of its closure date and continued to operate its Landfill, even though explosive levels of methane continued to migrate beyond the Landfill boundary and leachate containing hazardous wastes and toxic pollutants continued to be discharged into the Intervale. After giving statutory notice to the appropriate parties, Respondents filed suit on October 9, 1985 requesting relief which would force the City to comply with applicable federal and state environmental laws, force the City to install systems for leachate collection and control of methane gas migration and force the City to close its landfill. (App. 244-269)

After several hearings before a magistrate, an extensive, detailed Stipulation of Facts and a trial on the merits, the District Court in two Orders (March 26, 1986 and October 16, 1989) found, *inter alia*, that the City committed four federal environmental statutory violations, ordered the City to install remedial systems and ordered the City to close the landfill by January 1, 1990 without the possibility of extensions. (App. 40-53, App. 59-115)

The Petitioner's characterization of the District Court's Order on page 8 of its Petition is false, incomplete and misleading.[4] First, the Petitioner attempts to characterize the January 1, 1990 closure date as a state court ordered mandate to support its later argument against the Respondents' attorney fee award. The Petitioner omits that the District Court directly rejected Petitioner's argument that the January 31, 1985 Assurance and accompanying March 7, 1985 order resulted from a diligent state prosecution of a civil action to force the Petitioner to comply with federal law. On April 18, 1989, Magistrate Niedermeier issued a Report and Recommendation ruling the involvement of the state court was "mainly ministerial – to sign the Assurances of Discontinuance pursuant to 3 V.S.A. § 2822(c)(3)." (JA 163) Rejecting the City's claim that there was "diligent prosecution" by the

[4] In its Petition, Petitioner asserts: "The order required the City to close the landfill by January 1, 1990, the same closing date required by the March 7, 1985 state court order, but did not grant any of the relief sought by the plaintiffs in their action. The court further found, without a hearing on the subject, that the plaintiffs were prevailing parties entitled to attorney's fees to be determined." (Pet. at P. 8)

state, the Magistrate noted the repeated extensions given the City: "The 1981 Assurance of Discontinuance ordered the City to cease accepting refuse at the landfill by July 1, 1984. When the state agency still permits the landfill to remain open in 1988, there remains the question of reasonable 'diligence' by the state in prosecuting an action against the City." (JA 164-165) The City never appealed the Magistrate's Report and Recommendation on this issue. (JA 12) The Second Circuit likewise rejected the Petitioner's "court order" argument when it determined that other than a belated legal action on the Assurance related to the remedial systems, "the state made no attempt to ensure compliance with the rest of the Assurance; instead it allowed the city numerous extensions." (App. 20)

The Petitioner makes another slanted argument on the "court order" in a footnote claiming the Second Circuit "speculated" on the reasons for Petitioner's actions.[5] The Petitioner mischaracterizes the Second Circuit's analysis. The Petitioner fails to state that Petitioner first made its "speculation" argument to the District Court claiming the Respondents' lawsuit had no impact at all on Petitioner's behavior. (JA 163) Once rejected by the District Court, the Petitioner made its same "speculation" argument to the Second Circuit, then claiming the District Court was speculating. (App. 31) The Second Circuit considered the complex set of historical facts surrounding

[5] The Petitioner claims: "The court of appeals also speculated that, but for the district court order, the City would not have complied with the state court order to close the landfill by January 1, 1990." (Footnote 16, Pet. at P. 12)

the Petitioner's behavior and also rejected the Petitioner's "speculation" argument. (App. 31) Contrary to the Petitioner's speculation implication (no factual basis exists to support the court's conclusion) the Second Circuit cited numerous factual and legal reasons in support of its conclusion. (App. 31) With its Petition, the Petitioner seeks a third factual review on the same issue by this Court and thus reinserts its "speculation" argument.

Second, contrary to the Petitioner's characterization of the District Court orders, the Respondents obtained substantial relief: a) closure of the landfill; b) installation of the leachate collection and gas migration control systems; and, 3) Petitioner's compliance with RCRA and CWA. (App. 40-53 and 59-115)

Third, the Petitioner's statement that attorney's fees were awarded without a hearing is false because on December 11, 1989, the District Court held a hearing on Respondents' application for attorney's fee. (JA 15) The Petitioner's characterization wrongly implies that the Petitioner was prevented from challenging the Respondents' fee application. The District Court Order dated October 16, 1989 determined that the Respondents had substantially prevailed in both their RCRA and CWA claims and the Petitioner was ordered to pay Respondents' costs of litigation, including reasonable attorney's fees and expert witness fees. (App. 88-89) On November 1, 1989 Respondents filed their application for fees. (JA 14) The Petitioner filed memoranda on November 13, 1989 and December 8, 1989, totaling more than fifty pages of argument and attachments, opposing Respondents' application for attorney's fees. (JA 255-304) At the December 11, 1989 hearing, the Petitioner presented its

extended argument that the Respondents had not prevailed and should not be awarded fees or, at best, a reduced amount of fees. The District Court rejected the Petitioner's arguments and awarded Respondents their attorney's fees in its Order dated April 2, 1990. (App. 130-134) The Second Circuit affirmed. (App. 28-37)

Significantly on the issue of attorney's fees, the Petitioner only filed an opposition to Respondents' first request for fees. Although Petitioner states in its Footnote 23, Pet. at P. 22, that Respondents have been granted two more attorney's fee awards in this case, the Petitioner fails to disclose that *Petitioner did not file any opposition* to Respondents' subsequent fee requests, one before the District Court and one before the Second Circuit. (App. 38-39; App. 137-138) Thus, both awards were entered unopposed by Petitioner.

The Petitioner's totally irrelevant, never before stated, declaration concerning a possible stipulation of judgment early in the case to save attorney's fees is just more mischaracterization. (Footnote 31, Pet. at P. 24) The case record is absolutely devoid of any suggestion by the Petitioner that it would have stipulated to any judgment. In fact, the Petitioner's "never give an inch" attitude in this case makes its representation transparently suspect.

The City appealed the District Court judgment to the Second Circuit Court of Appeals on four issues. The Second Circuit in a thirty-four page opinion affirmed the District Court "in all respects." (App. 37) Intermixing fact, misstatements and argument, the Petitioner proceeds to attack the content of the Second Circuit opinion in its Statement of Case.

While the Petitioner has not sought certiorari on the "imminent and substantial endangerment" finding affirmed by the Second Circuit, the Petitioner, nevertheless, unfairly mischaracterizes the Second Circuit's holding.[6] After several pages of detailed legal and factual analysis, the Second Circuit concluded that "(B)ased on the foregoing, the district court properly concluded that there were sufficient circumstances that may present an imminent and substantial endangerment to health or the environment." (App. 28) In its decision, the Second Circuit cited specific facts such as the landfill had been leaking hazardous chemicals into the surrounding soil, groundwater and wetland, that the leachate was toxic to freshwater aquatic life including one vertebrate in the food chain, that the toxic chemicals were bio-accumulating and that the cattail marsh was a "climax system" susceptible to quick deterioration when the chemical insult became visible. (App. 27-28) Significantly in its Petition, the Petitioner has *not challenged these factual findings or the judgment* entered against it on this most important federal statutory violation.

The Petitioner attempts to use these false and misleading statements to influence this Court's viewpoint on

---

[6] Petitioner claims: "(H)owever, the Court did not identify any specific endangerment or explain why whatever it perceived the endangerment to be was imminent and substantial." (Pet. at P. 7)

"It (Second Circuit) did so by determining to give no meaning to the words "imminent" and "substantial" and reading the statute as authorizing judicial intervention to eliminate any risk posed by toxic wastes." (Pet. at P. 12)

all the arguments raised by the Petitioner. Both the District Court and the Second Circuit analyzed Petitioner's arguments carefully and rejected them. Not liking the results, the Petitioner asserts to this Court a Statement of Case as if the determinations made below did not exist.

Concerning the CWA violation found by the District Court and affirmed by the Second Circuit, the Petitioner proceeds to mischaracterize and distort both courts' findings.[7] The Second Circuit's opinion did not conclude that any facts determined by the District Court were erroneous. In fact, the Second Circuit opinion on the Clean Water Act issue explicitly determined that the District Court " . . . properly applied the statute (Clean Water Act) to findings that were not clearly erroneous." (App. 24) Furthermore, the Second Circuit's conclusion to the entire appeal was "(W)e affirm the judgment of the district court in all respects." (App. 37)

Furthermore, the Petitioner's previous legal position argued below has shifted in this appeal and thus the CWA issue is not properly postured for appellate review. All the cases now relied upon by Petitioner in its Clean Water Act argument (pp 27-30) were *never cited, analyzed or referenced* by Petitioner in any proceeding below, *i.e.*, in its District Court Proposed Conclusions of Law, in its

---

[7] Petitioner claims: "The opinion of the Second Circuit corrected the lower Court's erroneous finding that water flows from the landfill into the Intervale through the railroad culvert (App. 84). Instead the Second Circuit correctly observed that "any pollutants in water flowing through the culvert have already entered waters of the United States before they flow through the culvert. (App. 22)" (Pet. at P. 27-28)

Appellant's Brief to the Second Circuit or in its Petition for Rehearing and Suggestion for Rehearing in Banc before the Second Circuit.

In its October 16, 1989 Opinion, the District Court accurately stated that as of that time "(A)lmost all of the requirements of a subsection 1311(a) violation are evident in the facts, without substantial dispute." (App. 82) Having lost twice below, the Petitioner essentially requests this Court to become embroiled in a third factual dispute over the historical and geographical travel route of landfill leachate which the District Court had determined in its fact finding proceedings.

On the notice and delay issue, the Petitioner again distorts the record by omitting important facts and argues in the guise of stating the lower courts' decisions. In two footnotes in support of its allegation that Respondents did not give Petitioner adequate notice, the Petitioner asserts factual problems in Respondents' pleading and proof. The Petitioner leaves out important facts that substantially alter the factual content underlying the courts' decisions. (Footnote 4, Pet. at P. 5-6 & Footnote 10, Pet. at P. 9)

First, the District Court and Second Circuit found sufficient factual support for their conclusion that the Respondents gave the Petitioner adequate notice under RCRA and CWA. (App. 10-17; App. 118-129) Second, Petitioner omits its own significant procedural flaws. The Petitioner did not raise its no specific "endangerment" notice until four years after the Complaint was filed and two months after the District Court's determination that

the Petitioner was liable. (App. 124-125, 127) Furthermore, the Petitioner itself neither averred nor offered proof at any time that it was unaware of the endangerments or that it had not actually received the various notices given to it by the Respondents prior to suit being filed. In fact, in Petitioner's Motion for Summary Judgment filed in the District Court dated December 11, 1989, the *Petitioner conceded pre-suit notice had been received*: "Notice of the alleged violations of Sec. 6925 and 6930 were given to the appropriate parties pursuant to Sec. 6872(b)(1)(A) on October 8, 1985, the day before this action was filed with the Court." (JA 308) In its Statement of Case, the Petitioner tries to reverse this concession. The technical sufficiency of the notice given was a *factual* determination initially made by the District Court and affirmed in all respects as not being clearly erroneous by the Second Circuit.

Two of the most egregious examples of argumentation proffered as objective Statement of Case assertions involve the Petitioner's mischaracterization of the Second Circuit's *Hallstrom* analysis. P. 8-11

> 1. The Petitioner attempts to clothe the Second Circuit Opinion in the pre-*Hallstrom* terminology which had previously split the Circuits, *i.e.*, the pragmatic, discretionary approach to notice and delay requirements as opposed to the strict compliance approach ultimately adopted by this Court in *Hallstrom*. The Second Circuit did not deviate from the *Hallstrom* requirements but instead applied a statutory exception to the strict compliance approach explicitly recognized and confirmed in *Hallstrom*.

2. The Second Circuit Opinion gives considerable weight to the "hybrid complaint" filed by Respondents which did not exist in the *Hallstrom* case. Affirming the District Court decision, the Second Circuit also concluded that in a "hybrid" situation the policy reasons for requiring a delay period, as identified in *Hallstrom*, no longer are necessary given the competing requirements of the statute for quick action when hazardous waste violations are alleged. Petitioner summarily bypasses the District Court's and Second Circuit's "hybrid" analysis in its Statement of Case and attacks these Opinions as having "pragmatically waived" the notice and delay requirements applicable to non-hazardous waste claims. At no place does the Second Circuit assert that its decision constitutes a "pragmatic waiver" of notice and delay requirements in non-hazardous waste claims.

The City vigorously contested the Respondents' claims throughout the life of this lawsuit to the point that the Second Circuit noted:

> "In fact, until the trial in the court below of the federal statutory claims, the city would not even concede either that the decomposition of garbage in the landfill caused the pre-December 27, 1985 explosive levels of methane gas at the landfill boundary, or that leachate, which escaped the leachate collection system, was migrating beyond the landfill boundary." (App.31)

With its Statement of Case, the Petitioner paints a one-sided factual setting as if the Petitioner was still at the trial level asserting and arguing contested facts that supported its position. The Petitioner has not provided

this Court with a Statement of Case which is an accurate summary of the relevant facts or of the treatment accorded those facts by the courts below.

REASONS FOR DENYING THE WRIT

A. The District Court and Second Circuit Court of Appeals fully considered and properly determined that the citizen Respondents complied with applicable notice and delay requirements as those terms were interpreted and applied in *Hallstrom v. Tillamook County*, 110 S.Ct. 304 (1989). The Respondents incorporate by reference the well reasoned decisions on this issue rendered by the District Court on March 15, 1990 (App. 118-129) and the Second Circuit on June 12, 1991 (App. 10-22).

1. The facts in this case are significantly distinguishable from the facts in *Hallstrom*.

In *Hallstrom*, the plaintiffs did not make claims respecting hazardous waste violations under subchapter III of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.* In addition, plaintiffs in Hallstrom failed to give any notice either to the EPA Administrator or to the state where the violation occurred until after the suit was commenced. *Hallstrom*, 110 S.Ct. at 307-308. In the Respondents' case, the Respondents asserted claims respecting hazardous waste violations under subchapter III of RCRA and gave notice to the City, the State of Vermont and the Administrator of EPA one day prior to filing suit. In addition to the Respondents' hazardous waste claims, the Respondents asserted Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, claims,

Vermont Groundwater Act claims and pendent state claims.

2. The Second Circuit decision is fully consistent with *Hallstrom*.

While *Hallstrom* states that notice and delay requirements are mandatory conditions precedent to commencing suit under the RCRA citizen-suit provision, *Hallstrom* also recognized an exception created by Congress to these requirements when hazardous waste violations under subchapter III of RCRA are alleged. *Hallstrom* 110 S. Ct. at 309. It is this exception that the District Court and Second Circuit applied to the Respondents' statutory claims.

Furthermore, the District Court and Second Circuit were faced with a question not presented in *Hallstrom*. Respondents brought claims both for hazardous waste and solid waste violations under RCRA. Analyzing Congressional intent for notice and delay requirements in the context of Respondents' "hybrid" complaint, the District Court held that the delay periods otherwise required before commencing a non-subchapter III suit become inapplicable. (App. 122 and App. 15) Affirming the District Court, the Second Circuit also emphasized the *factual uniqueness* of the Respondents' claims in that "both subchapter III and non-subchapter III claims all arose from the operation of a single facility and are based on the same core of interrelated facts." (App. 17)

Thus the District Court and Second Circuit decisions uphold the strict interpretation given to non-subchapter

III claims while at the same time recognizing and applying the statutory exception to these requirements as acknowledged by *Hallstrom*.

3. The Second Circuit is the first and only Circuit since *Hallstrom* to address the statutory notice and delay exception created by Congress for hazardous waste claims under RCRA.

The Second Circuit decision is the first and only decision made by any Circuit Court on the exception to the notice and delay requirements related to hazardous waste claims under Subchapter III of RCRA. The Petitioner cites two post *Hallstrom* cases to give the appearance of other Circuits in conflict with the Second Circuit decision. Neither case concerns hazardous waste subchapter III claims and their facts are not similar to the facts in this case. *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991), involved the Sierra Club's attempt to enjoin the Forest Service's timber management activities under the Endangered Species Act ("ESA") to protect the red-cockaded woodpecker. The only relationship *Yeutter* has to *Hallstrom* was whether the notice requirements under the ESA were to be considered jurisdictional or procedural, an issue not resolved by *Hallstrom*. *National Environmental Foundation v. ABC Rail Corp.*, 926 F.2d 1096 (11th Cir. 1991) was a Clean Water Act case involving an industrial discharger into Buxahatchee Creek in Calera, Alabama. There is no special significance to this case as it merely followed *Hallstrom* in strict adherence to notice and delay requirements under the CWA and not under Subchapter III of RCRA. Again the facts and claims in that case are very different from the facts and claims in this case.

4. There are no conflicts in the Circuits on this issue and the Circuits are not in "hopeless disarray".

Contrary to Petitioner's hyperbole, there are no conflicts in the Circuits on the *Hallstrom* issues decided by the Second Circuit. Petitioner has not cited one case establishing its alleged conflict. The Second Circuit carefully analyzed *Hallstrom* in detail and certainly did not retrogress to pre-*Hallstrom* rhetoric or analysis. The Circuits are not in "hopeless disarray". In fact, the Second Circuit decision advanced the rationale in *Hallstrom* by providing judicial direction and order on specific issues not faced or addressed in *Hallstrom*.

5. The result in this case is consistent with RCRA's purpose and effectuates Congress' intent of cleaning up and closing landfills that discharge hazardous wastes and toxic pollutants into the environment

When Congress enacted RCRA in 1976, it sought to close "the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." H.R.Rep. No. 1491, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6238, 6241. RCRA declares it is national policy, *inter alia*, that waste should be disposed of as to "minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b) By closing the Petitioner's Landfill and causing remedial systems to be installed, the

District Court and Second Circuit decisions are fully consistent with RCRA's national policy and effectively implement Congress' intent in enacting RCRA.

B. The District Court and Second Circuit Court of Appeals fully considered and properly determined that as a matter of fact and law the Respondents substantially prevailed and properly awarded them compensatory and enhanced attorney's fees for achieving the following results:

a. Petitioner was found to have committed four statutory violations of RCRA and CWA;

b. Petitioner was ordered to close its landfill; and

c. Petitioner was ordered to install leachate collection and methane gas control systems by a date certain.

Respondents incorporate by reference the well reasoned decisions on this issue rendered by the District Court on April 2, 1991 (App. 130-134) and the Second Circuit on June 12, 1991 (App. 28-37.)

1. The Petitioner's claim of "no relief" or "nominal relief" is based on its selective facts woven into an ill-founded argument; the Petitioner's same arguments were made to and rejected by all four judges in both the District Court and Second Circuit.

The Petitioner rests its second Question Presented on the singular premise that the Respondents obtained "no relief" or "nominal relief". This Court need not go beyond this inaccurate premise for a sufficient reason to deny the Writ on the question.

Using a lengthy, detailed recitation of historical events set out in memoranda combined with the Petitioner's own "spin" on those events, the Petitioner attempted to persuade both the District Court and the Second Circuit that the Respondent obtained "no relief" or "nominal relief". Following a detailed analysis of Petitioner's facts placed in historical context of Respondents' lawsuit, both courts and four judges unequivocally rejected Petitioner's claim. (App. 28-37; App. 130-134) Having been rejected twice before on the same factual argument, Petitioner now seeks to engage this Court in a third review of complicated historical dates and events to establish that the Respondents gained no relief or nominal relief. As detailed in Respondents' Statement of Case at P. 11 above, the Petitioner has waived this issue by not opposing the subsequent fee requests filed by the Respondents which were granted as unopposed by the District Court and Second Circuit.

C. The District Court and Second Circuit Court of Appeals fully considered and properly determined that the railroad culvert is a point source for the discharge of pollutants from the landfill into waters of the United States based on the discharge from Petitioner's landfill of toxic pollutants through a culvert into a wetland. The Respondents incorporate by reference the well reasoned decisions on this issue rendered by the District Court on October 16, 1989 (App. 81-84) and the Second Circuit on June 12, 1991 (App. 22-24)

1. In its Petition, the Petitioner now asserts new grounds which were not raised or considered below and therefore the Petition should be denied.

All the cases on this issue now cited by the Petitioner in its Petition were *never relied upon, analyzed or cited* by

the Petitioner previously. Neither the District Court nor the Second Circuit read briefs, heard argument or analyzed their decisions related to Petitioner's newly cited cases. This issue should not be reviewed in this posture because the lower courts were not accorded the opportunity to review their merit. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Miree v. DeKalb County, Ga.*, 433 U.S. 25, 35 (1977)

Petitioner's newly cited cases pre-date the October 16, 1989 District Court decision and are completely unrelated, factually and legally, to the toxic pollutant discharges at Petitioner's landfill. They all involve whether EPA, as a matter of national policy, should require NPDES permits for all dams that discharge dead fish (biological pollution) or cause water quality changes (low dissolved oxygen, dissolved minerals and nutrients, temperature changes, etc.) Unlike Respondents' case which involves toxic pollutant discharges from a factually unique landfill, these cases address a heavily contested national policy debate over thousands of affected dam facilities which impact a wide variety of non-toxic pollutants.

2. No significant conflict exists in the Circuits on the interpretation of a point source under the Clean Water Act.

As this Court stated in *International Paper Co. v. Ouellette*, 107 S.Ct. 805, 811-812 (1987), "The Act (Clean Water Act) applies to all point sources and virtually all bodies of water." The definition of a point source is broadly interpreted by the courts. *United States v. Earth*

Sciences, Inc., 599 F.2d 368, 375 (10th Cir. 1979). Very little conflict exists in the Circuits on the definition of a point source. This proposition is supported by the fact that in its Second Circuit Brief the Petitioner *did not offer a single case* in support of its opposition to Respondents' CWA claim.

3. Petitioner's claim is based on disputed factual assertions which are not reflected in proper judicial findings and do not merit this Court's review.

As described above in Respondents' Statement of Case at P. 13, the Petitioner attempts to base a reviewable question on facts which were not determined by the District Court. Furthermore, the Petitioner mischaracterizes a District Court finding as erroneous but corrected by the Second Circuit. No where does the Second Circuit determine that any of the District Court findings are erroneous. The Petitioner's argument is based on an inaccurate premise not supported by the facts as found by the District Court and adopted *in toto* by the Second Circuit.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should not be granted.

Respectfully submitted,

WILLIAM W. PEARSON
MOLLOY, JONES & DONAHUE, P.C.
33 North Stone Avenue, Suite 2100
Tucson, Arizona 85701
(602) 620-5520

Counsel of Record

December, 1991